# PLEADING ESTOPPEL.

## II.

THE preceding installment of this article dealt with the English and the American authorities in the so-called common law states. It now remains to consider the question of the necessity of pleading estoppel in the states which have adopted the code system of pleading. Should we expect to find the rule different under the code system than under the common law system? The usual code provisions respecting the complaint and answer are as follows: "The complaint must contain: * * * A plain and concise statement of the facts, constituting each cause of action, without unnecessary repetition,"[1] and "The answer of the defendant must contain: * * * A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition."[2] These or similar sections of the various codes of procedure are the provisions which are pointed out and relied on as rendering the rules as to pleading estoppel in the code states different from those adhered to in those states in which the common law system of pleading, or an approximation thereto, is still in vogue. These provisions of the code are interpreted to mean that the facts constituting the cause of action or ground of defense, whatever they may be, must be succinctly and clearly stated in the pleadings.[3]

Adopting this as the reason for pleading matter constituting an estoppel in the code states, it seems that no reason or justification exists for drawing a distinction, as to the necessity of pleading, between the different kinds of estoppel, but that estoppel by matter of record or deed should be pleaded as well as estoppel by matter in pais and vice versa. And, indeed, the courts of the states having the reformed procedure have adopted quite generally this attitude, and have held that matter of record,[4] of deed,[5] or in pais[6] to be availed

---

[1] New York Code Civ. Proc., § 481.

[2] New York Code Civ. Proc., § 500.

[3] Gill v. Rice (1861), 13 Wis. 549; Piercy v. Sabin (1858), 10 Cal. 22.

[4] **California.** Piercy v. Sabin (1858), 10 Cal. 22; Brown v. Campbell (1895), 110 Cal. 644; Estate of McNeil (1909), 155 Cal. 333.

**Colorado.** Hox et al. v. Leis (1870), 1 Colorado 187.

**Kentucky.** Morrison v. Price (1908), 130 Ky. 139, 112 S. W. 1090.

**North Carolina.** Thomason v. Seaboard Air Line Ry. Co. (1906), 142 N. C. 300, 55 S. E. 198.

**Oregon.** Pacific Live Stock Co. v. Isaacs (1908), 52 Or. 54, 96 Pac. 461; Davis v. Chamberlin (1908), 51 Oregon 304, 98 Pac. 154.

**Utah.** Bonanza Coal Min. Co. v. Golden Head Min. Co. (1905), 29 Utah 159, 80 Pac. 736.

See also 9 Ency. of Pleading and Practise 617 and cases there cited, and 23 Cyc. 1523, 1530 and 1531 and cases there cited.

[5] See Bigelow on Estoppel, 5th Ed., p. 707; Jones v. Peebles (1909), 130 Ala. 269, 30 So. 564.

[6] **Alabama.** Blair v. Williams (1909), 159 Ala. 655, 49 So. 71; Bank v. Leland (1898), 122 Ala. 289; Jones v. Peebles (1901), 130 Ala. 269, 30 So. 564. (Alabama is not a true code state as it maintains the distinction between legal and equitable actions, but as its procedure is statutory and resembles that of the code states more nearly than that of the common law states, these cases are cited here).

**Colorado.** Leachen & Sons Rope Co. v. Craig (1903), 18 Col. Ct. App. 353, 71 Pac. 885.

**Connecticut.** Wilmot v. McPadden (1905), 78 Conn. 176, 61 Atl. 1069.

**Federal.** In re Stoddard Bros. Lumber Co. (1909), 169 Fed. 190; Pennsylvania Co. v. Cole. (1904), 132 Fed. 668. (The latter decision was on pleadings under the equity rules of the Federal courts and strictly speaking is not authority for the rule in code states).

**Georgia.** Fidelity & Deposit Co. v. Nisbet (1904), 119 Ga. 316, 46 S. E. 444; Hill v. Terrell (1905), 123 Ga. 49, 51 S. E. 81; Madison Supply & Hardware Co. v. Richardson (1910), — Ga. Ct. App. —, 69 S. E. 45.

**Indiana.** Taylor v. Patton (1903), 160 Ind. 4, 66 N. E. 91; Adams v. Adams (1903), 160 Ind. 61, 66 N. E. 153; Webb v. Hancock Mutual Life Ins. Co. (1904), 162 Ind. 616, 69 N. E. 1006; Railway Co. v. Moore (1907), 170 Ind. 328, 82 N. E. 52.

**Iowa.** Haag v. Andrus (1904), — Iowa —, 100 N. W. 490; Continental Ins. Co. v. Clark et al. (1904), 126 Iowa 274, 100 N. W. 524; Watkins v. Iowa Cent. R. R. Co. (1904), 123 Iowa 390, 98 N. W. 910; McCorkell v. Herron (1905), 128 Iowa 324, 103 N. W. 988; Barnes v. Century Sav. Bank (1910), — Iowa —, 128 N. W. 541.

**Kentucky.** Peyton v .Old Woolen Mills Co. (1906), 122 Ky. 361; Hilton v. Calvin (1904), 25 Ky. Law 1808, 78 S. W. 890; Brown Wallace (1909), — Ky. —, 116 S. W. 763.

**Louisiana.** Thomas v. Blair (1903), 111 La. 678, 35 So. 811; In re Quaker Realty Co. (1910), — La. —, 53 So. 526.

**Missouri.** Realty Co. v. Musser (1902), 97 Mo. App. 114; Carthage v. Carthage Light Co. (1902), 97 Mo. App. 20; George B. Loving Co. v. Cattle Co. (1903), 176 Mo. 330, 75 S. W. 1095; Golden v. Tyer (1904), 180 Mo. 196, 79 S. W. 143; Keeney v. McVoy (1907), 206 Mo. 42, 103 S. W. 946; Turner v. Edmonston (1908), 210 Mo. 411, 109 S. W. 33; Railway Co. v. Railway Co. (1909), 222 Mo. 461, 121 S. W. 300.

**Montana.** Eisenhauer v. Quinn (1907), 36 Mont. 368, 93 Pac. 38; City of Butte v. Mikosowitz (1909), 39 Mont. 350, 102 Pac. 593.

**Nebraska.** Nebraska Mortgage Loan Co. v. Van Kloster (1894), 42 Neb. 746; Union State Bank v. Hutton (1901), 64 Neb. 571, 95 N. W. 1061; Carnahan v. Brewster (1902), 2 Neb. (unofficial) 366, 96 N. W. 590.

**New Jersey.** Scrymser v. Seabright Electric L. Co. (1908), 74 N. J. Eq. 587, 70 Atl. 977.

**New York.** Dresler v. Hard (1889), 6 N. Y. Supp. 500.

**Ohio.** Metropolitan Life Insurance Co. v. Howle (1903), 68 Ohio St. 614.

**Oklahoma.** Deming Inv. Co. v. Shawnee Fire Ins. Co. (1905), 16 Okl. 1, 83 Pac. 918; Town v. Gas Co. (1908), 22 Okl. 347, 97 Pac. 1007; Blakemore v. Johnson (1909), 24 Okl. 544, 103 Pac. 554; American Jobbing Ass'n v. James (1909), 24 Okl. 460, 103 Pac. 670; Cooper v. Flesner (1909), 24 Okl. 47, 103 Pac. 1016; Holt v. Holt (1909), 23 Okl. 639, 102 Pac. 187.

**Oregon.** Union St. Ry. Co. v. First Nat. Bank (1903), 42 Oregon 606, 72 Pac. 586.

**South Dakota.** McQueen v. Bank (1906), 20 S. Dak. 378, 107 N. W. 208; Hickox v. Eastman (1908), 21 S. Dak. 591, 114 N. W. 706.

**Texas.** Word v. Marrs (1904), 36 Tex. Civ. App. 637, 83 S. W. 17; Harle v. Texas Southern R. R. Co. (1905), 39 Tex. Civ. App. 43, 86 S. W. 1048; Rice & Irrigation Co. v. Eidman (1906), 41 Tex. Civ. App. 542, 93 S. W. 698; Couch v. Railroad Co. (1908), 49 Tex. Civ. App. 188, 107 S. W. 872; Oil Co. v. Storage Co. (1909), — Tex. Civ. App. —, 116 S. W. 397; El Paso & S W. R. R. Co. v. Eichel & Weikel (1910), — Tex. Civ. App. —, 130 S. W. 922.

**Washington.** Olson v. Springer (1910), — Wash. —, 110 Pac. 807.

**Wisconsin.** Wisconsin Farm Land Co. v. Bullard (1903), 119 Wis. 320, 96 N. W. 833; Pratt v. Hawes (1903), 118 Wis. 603, 95 N. W. 965.

See also 16 Cyc. 806, and cases there cited and 8 Encyc. of Pleading and Practice 7, and cases there cited.

of as a defense by way of estoppel must be pleaded. Some jurisdictions have gone even further in their statement of the rule, and have announced the doctrine that matter of estoppel, whether as an element of a cause of action or as a defense, must be pleaded if it is to be availed of as a bar by the party offering it in evidence at the trial.[7] This rule has been qualified in most jurisdictions by cases holding that the rule as to the necessity of pleading estoppel applies only where opportunity to do so is given to the party offering it.[8] This means no more than that the regular order or method of pleading is not to be varied even though estoppel enters into the case as an element of the cause of action or defense. As a practical application of this rule the result is that in those states where the answer is the last pleading allowed, except in case of counterclaim or demurrer or unless special leave of court is obtained, as in New York,[9] if the answer consists of new matter to which the plaintiff would naturally reply matter constituting an estoppel, it is not necessary to plead such matter in order to make use of it as a bar to the defense. This rule, applied in those cases where the defendant files a specific

[7] **California.** Fritz v. Mills (1909), — Cal. —, 106 Pac. 725; Hubbard v. Lee (1907), 6 Cal. App. 602, 92 Pac. 744.

**Georgia.** Brice v. Sheffield (1904), 118 Ga. 128, 48 S. E. 925.

**Indiana.** Taylor v. Patton (1903), 160 Ind. 4, 66 N. E. 91.

**Kentucky.** Peyton v. Old Woolen Mills Co. (1906), 122 Ky. 361, 91 S. W. 719.

**Montana.** Capital Lumber Company v. Barth et al. (1905), 33 Mont. 94, 81 Pac. 994.

**Nebraska.** Union State Bank v. Hutton (1901), 64 Neb. 571, 95 N. W. 1061.

**North Carolina.** McCollum v. Chisholm (1907), 146 N. C. 18, 59 S. E. 160.

**Oklahoma.** Deming Inv. Co. v. Shawnee Fire Ins. Co. (1905), 16 Okl. 1, 83 Pac. 918; Tonkawa Milling Co. v. Town of Tonkawa (1905), 15 Okl. 672, 83 Pac. 914; American Jobbing Ass'n v. James (1909), 24 Okl. 460, 103 Pac. 670.

**Texas.** Oil Co. v. Storage Co. (1909), — Tex. Civ. App. —, 116 S. W. 397; Rice & Irrigation Co. v. Eidman (1906), 41 Tex. Civ. App. 542, 93 S. W. 698; Rail v. City Nat. Bank. (1893), 3 Tex. Civ. App. 557, 22 S. W. 865.

**Utah.** Homberger v. Alexander (1895), 11 Utah 363, 40 Pac. 260.

**Washington.** Jacobs v. First Nat. Bank (1896), 15 Wash. 358.

See 16 Cyc. 808 and cases there cited.

[8] **California.** Young v. Blakeman (1908), 153 Cal. 477, 95 Pac. 888.

**Georgia.** Rowe v. Weichselbaum Co. (1907), 3 Ga. App. 504, 60 S. E. 275.

**Indiana.** Railroad Co. v. Moore (1907), 170 Ind. 328, 82 N. E. 52.

**Louisiana.** Insurance Co. v. Von Schlemmer (1908), 122 La. 280, 47 So. 606.

**Missouri.** Powell v. Tinsley (1909), 137 Mo. App. 551, 119 S. W. 47.

**Montana.** Eisenhauer v. Quinn (1907), 36 Mont. 368, 93 Pac. 38; Capital Lumber Co. v. Barth (1905), 33 Mont. 94, 81 Pac. 994.

**Oregon.** Christian v. Eugene (1907), 49 Or. 170, 89 Pac. 419; Tieman v. Sachs (1908), 52 Or. 560, 98 Pac. 163.

**South Dakota.** McQueen v. Bank (1906), 20 S. Dak. 378.

**Wisconsin.** Gans v. St. Paul F. & M. Ins. Co. (1877), 43 Wis. 108.

[9] New York Code of Civ. Proc. § § 478, 487, 493 and 514. For examples see Young v. Blakeman (1908), 153 Cal. 477, 95 Pac. 888; Keystone Life Ins. Co. v. Von Schlemmer (1908), 122 La. 280, 47 So. 606; Gans v. St. Paul F. & M. Ins. Co. (1877), 43 Wis. 108.

denial and the plaintiff's position is that the defendant because of his conduct, or a judgment, or a recital in a deed signed by the defendant, is estopped to deny the fact which his pleading indicates he intends to deny, renders it unnecessary for the plaintiff to plead the matter constituting the estoppel as a sort of a reply for in the reformed system of pleading there is no such practice as a further pleading after a denial. This, as is stated in the former installment of this article,[10] is not of necessity the practice in the states adhering to the common law system. The rule as above stated also applies in cases where only the general denial is filed as an answer or where the matter which the defendant contends the plaintiff is estopped to assert appears in the reply. In this latter case it is not necessary to set up the matter constituting the estoppel to meet the reply because the codes provide for no other pleading except a demurrer to follow a reply. Where the general denial is filed to the complaint or petition the rule is the same as the rule in the common law states when the general issue is filed, and the reason given for the rule in such states[11] operates here and is supplemented by the reason given for not requiring facts constituting an estoppel to be pleaded to a specific denial. It may be questioned, however, whether a case ever arises in a code state under proper pleadings in which the plaintiff finds it necessary to take the position that the defendant is estopped to deny certain facts alleged in the complaint or petition, for it may be contended, and, as it seems to the writer, with some degree of confidence, that usually where such a situation arises the plaintiff's case rests in estoppel and the facts contituting the estoppel should be set up in the complaint or petition rather than the facts which are denied.[12] The general rule that estoppel must be pleaded in order to be taken advantage of by the party offering it has been further qualified by cases in some jurisdictions holding that where the facts constituting estoppel are introduced in evidence by the adverse party himself even though for another purpose,[13] or where the adverse party does not object to the introduction in evidence of the facts relied on to show estoppel,[14] the court will allow the estoppel

[10] See former installment of this article, 9 Mich. Law Rev. 490-1.

[11] See 9 Mich. Law Rev. 491-2. For example of general denial taking away opportunity to plead estoppel see Powell v. Tinsley (1909), 137 Mo. App. 551, 119 S. W. 47.

[12] See page — of this article.

[13] **Colorado.** Gilette v. Young (1909), 45 Col. 562, 101 Pac. 766.

[14] **Federal.** Standard Sanitary Mfg. Co. v. Arrott (1905), 135 Fed. 750.

**Kansas.** Edwards v. Sourbeer (1906), 73 Kan. 224, 84 Pac. 1033.

**Missouri.** McDonnell v. De Soto Sav. & Bldg. Ass'n (1903), 175 Mo. 250, 75 S. W. 438.

**Montana.** Capital Lumber Co. v. Barth (1905), 33 Mont. 94, 81 Pac. 994.

**Wisconsin.** Lawton v. Racine (1909), 137 Wis. 593, 119 N. W. 331. (This case is

even though it is not pleaded. This rule is not universal, however, and there are some cases holding that a failure to object to the introduction of the facts in evidence is not a waiver of the failure to set up estoppel in the pleadings.[15]

The courts of some jurisdictions have adopted a peculiar doctrine with regard to the effect of failure to plead estoppel of record,[16] or "former adjudication" as it is now quite generally termed. These courts state the principle that while former adjudication in order to be used as a bar must be pleaded, still if it is not pleaded it may be introduced in evidence, and as such, will be conclusive as to the issues decided in the former suit. One of the most recent of the cases enunciating this doctrine is *Standard Supply & Equipment Company* v. *Merritt*.[17] The plaintiff in this case brought suit against the defendant on four promissory notes, suing on each in separate actions of which this case was one. One of the cases came to trial and a default judgment was rendered for plaintiff therein. As the notes were all given for the same consideration, at the same time, and under the same circumstances, the plaintiff on the trial of the present case and after the production of much other evidence (it does not appear whether or not against the objection of the defendant), introduced in evidence the record showing the judgment in the former case. The court immediately directed a verdict for the plaintiff. On appeal the judgment was sustained and Judge SCOTT of the Supreme Court of New York, Appellate Term, in his opinion said: "Nor is it of any moment that the judgment was not pleaded. The issues between the parties were issues of fact to be determined by evidence. The judgment was conclusive evidence between the parties as to the facts necessarily involved, and it was as such evidence that it was offered and received. It is only when it is desired to use a judgment as a bar that it is necessary to plead it. It may, without being pleaded, be used as evidence, and conclusive evidence, of the facts established thereby." It does not appear from the report of this case whether the issue was raised by an answer containing new matter or by an answer consisting of a denial and in either case the

---

authority for the rule that estoppel need not be pleaded in express terms, but it is sufficient if the facts essential to constitute an estoppel are pleaded. See Bank of Antego v. Ryan (1899), 105 Wis. 37).

[15] **Alabama.** Jones v. Peebles (1900), 130 Ala. 269, 30 So. 564.
**Iowa.** Schofield v. Cooper (1905), 126 Iowa 334, 102 N. W. 110.
**South Dakota.** McQueen v. Bank (1906), 20 S. Dak. 378, 107 N. W. 208.

[16] Garton v. Botts (1880), 73 Mo. 274; Standard Supply & Equipment Co. v. Merritt (1905), 96 N. Y. Supp. 181, 48 Misc. 498; Kreckler v. Ritter (1875), 62 N. Y. 372; Southern Pacific R. R. Co. v. United States (1897), 168 U. S. 1. But see contra: Meiss v. Gill (1886), 44 Ohio St. 253; and cases cited under note 4 of this article.

[17] 96 N. Y. Supp. 181, 48 Misc. 498.

result reached by the court was the proper one. If raised by answer by way of new matter a reply could not be filed, since there is no reply in New York in such a case except with consent of court, and if raised by a denial, as heretofore explained,[18] a subsequent pleading on the part of the plaintiff would not have been proper, so in any event there was no opportunity to plead the estoppel by judgment. But the language of the court is very misleading and if the court intended to state the rule to be that evidence of a former adjudication can be introduced in a subsequent case, between the same parties, involving a like issue, and on that issue will be received by the court over the objection, by the opposing party, that it has not been pleaded, and treated as conclusive, it is certainly incorrect in principle and opposed to the weight of authority of the code states. To say that if not pleaded it cannot be introduced as a "bar" but may be used as "conclusive evidence" is certainly drawing a distinction without a difference. The use of matter constituting an estoppel as a bar simply means that on the point for which the estoppel is introduced the opposing party cannot dispute the allegations made by the party introducing the estoppel; if it happens that the former judgment decided all the issues raised in the present case, then the opposing party cannot dispute any of the allegations made by the party introducing the estoppel and so such allegations must be taken as true. How much does treating the judgment as conclusive evidence, in a subsequent suit, of the facts decided by it differ in result from the use explained above? If it is treated as conclusive evidence on a certain point, then no matter how much or how weighty evidence the opposing party may introduce, it will be given no consideration, and cannot be submitted to the jury, and the point will not be retried. Is this not in effect the same as refusing to allow one of the parties to dispute the decision of the court on a certain point in a former suit between the same parties? And is this not estoppel by matter of record? It is not meant to say that a former judgment may not be introduced as persuasive evidence without being pleaded, for this is and always has been the rule at common law[19] and nothing appears in the code to change it,[20] but the writer does not believe it should be admitted against the objection of the opposing party and treated as conclusive evidence unless pleaded as an estoppel. It is possible that all the courts meant in any of the cases cited was that where facts constituting an estoppel are allowed to be introduced in evidence without

[18] See page —— of this article.

[19] See former installment of this article 9 Mich. Law Rev. 489.

[20] Gray v. Linton (1906), 38 Colo. 175, 88 Pac. 749.

objection, they may operate as an estoppel even though not pleaded. If this is the meaning, then these cases are in accord with others hereinbefore cited on this proposition.[21] But as the Merritt case relies for its authority on *Kreckler* v. *Ritter*,[22] and in this case objection was made by the plaintiff to the admission of the evidence of the record, the above conclusion hardly seems justified.

One of the most interesting and at the same time most difficult phases of this question of the necessity of pleading estoppel arises when the matter of estoppel forms a part of the plaintiff's affirmative case. Perhaps the most usual situation where this occurs is in cases involving agency by holding out or agency by estoppel as it is sometimes termed. Suppose for instance the plaintiff has entered into what he understood to be a contract with the defendant made through one whom the plaintiff understood was an agent of the defendant; a breach has occurred, and the plaintiff wishes to sue the defendant on the contract. Suppose that at the time of entering into the contract the plaintiff did not inquire thoroughly into the authority of the person who acted as agent but that by defendant's statements and actions he was led so to believe and for that reason did not inquire as carefully into the authority as he otherwise would have done. Suppose still further that the party with whom plaintiff dealt was, as a matter of fact, not the authorized agent of the defendant but that the plaintiff does not learn of this fact until after he has begun suit or even until the trial of the case has begun. This being the situation the plaintiff naturally sues the defendant on the contract, pleading that the defendant by his agent undertook and agreed, etc., or as an act done by an agent is in legal effect done by the principal, plaintiff's pleading may simply state that the defendant undertook and agreed, etc. Suppose the defendant denies that by his agent or otherwise he ever promised. When the plaintiff learns the facts of the case, either before or at the trial, and finds that the party with whom he made the contract was not then the agent of the defendant, must he amend his complaint or petition to show the facts constituting the estoppel or will he be allowed to present these facts in evidence without having pleaded them? The law is that one who holds another out as his agent, and allows a third party to contract with him on such basis, is estopped to deny the agency and is liable on the contract made if the third party relied on the holding out and believed the party with whom he contracted to be the agent of the first party.[23]

---

[21] See note 14 on page —— of this article.

[22] 62 N. Y. 372.

[23] Mechem-Agency, § § 83-4.

Let us turn to the cases to discover, if possible, what rule, or rules, have been adopted in practice and the reasons given for the adoption of the same. One of the best cases, dealing with the situation suggested, that have come to the writer's attention is the case of *Fritz* v. *Mills*.[24] The plaintiff in that case alleged that the defendant "through her duly authorized agent, executed her agreement in writing, wherein the said plaintiff agreed to sell, and the defendant agreed to buy" a certain tract of land. The defendant, in her answer, denied the execution of the contract. At the trial it appeared that the party who had pretended to execute the contract as the agent of the defendant was not, in fact, defendant's agent, though evidence appeared, which, if availed of, would have estopped the defendant to deny the agency. The court refused to allow a recovery on the theory of estoppel because the plaintiff had not pleaded it. In the opinion in this case it was said: "That a party, who has an opportunity to plead an estoppel, upon which his cause of action or defense depends, must do so, is the recognized rule in this state." Another case to the same effect is *Rail* v. *City National Bank*.[25] In this case the plaintiff brought suit against the defendant bank upon a contract alleged to have been made by the bank's authorized agent. The plaintiff appealed from a judgment for the defendant on the ground, among others, that the court should have charged the jury that, if the bank held out the person dealt with as having authority to make the contract on its (the bank's) behalf, it would be liable for his contract, though, in fact, he was not authorized to make it. The court, in commenting upon this objection, said: "No such state of case was set out in his pleadings. To bind the principal for an unauthorized act of the agent he must not only hold him out, but the apparent authority must be relied on in good faith, and in the exercise of reasonable prudence, by the party invoking the conclusive presumption of authority. We understand the rule in this state to be that an estoppel, which is the principle involved, to be available must be alleged." There are many other cases, involving agency by estoppel, or other state of facts where estoppel is the ground relied on by the plaintiff for his recovery, which enunciate the same general rule as the cases cited above.[26]

[24] (1909), — Cal. —, 106 Pac. 725.

[25] (1893), 3 Tex. Civ. App. 557, 22 S. W. 865.

[26] Homberger v. Alexander (1895), 11 Utah 363, 40 Pac. 260; Jacobs v. First National Bank (1896), 15 Wash. 358; Clark v. Johnson et al. (1908), 155 Ala. 648, 47 So. 82 (bill in equity); American Jobbing Ass'n v. James (1909), 24 Okl. 460, 103 Pac. 670 (waiver of performance); Kellog-Mackay-Cameron Co. v. Havre Hotel Co. (1909), 173 Fed. 249 (the facts constituting the estoppel in this case were set out affirmatively in the complaint, but the question of the necessity of so doing was not raised); McCollum v. Chisholm (1907), 146 N. Car. 18, 59 S. E. 160; Taylor v. Patton (1903), 160

Some of the courts relying on the general rule that the facts constituting the estoppel need not be pleaded where there is no opportunity to do so have reached some very odd results in attempting to apply this rule in cases where the estoppel constitutes a part of the plaintiff's affirmative case. A good illustration of the result thus obtained is furnished by the case of *Capital Lumber Co.* v. *Barth.*[27] In this case the complaint counted on goods sold and delivered to the defendants, and the issue of fact was the agency of the person who bought the goods for the defendants. The evidence failed to show an actual agency, but did show facts constituting an estoppel against the defendants to deny the agency. It did not appear that the plaintiff knew, until the time of the trial, that he would be forced to rely upon the estoppel. The evidence was introduced without objection, but later the question of whether recovery should be allowed on the theory of estoppel, since it had not been pleaded, was raised. The court, in disposing of this question, said: "It is the general rule that matter of estoppel, to be effective, must be alleged. Where, however, there has been no opportunity to allege it, it may be given in evidence with the same conclusive effect as if alleged. * * * Since it does not appear that the plaintiff knew that he would have to rely upon the estoppel, the matter was properly proved though not alleged. Again the evidence having been admitted without objection, the plaintiff was entitled to have it submitted to the jury as if warranted by the pleadings." In submitting to the jury the facts constituting an estoppel because no objection had been made the court is in accord with several cases hereinbefore cited.[28] But in offering as one of the reasons for this action the lack of opportunity to plead the facts constituting the estoppel, the court, even though supported by some slight authority,[29] was clearly wrong, since there was no real lack of opportunity as that word is used in connection with the rule as to the necessity of pleading estoppel. Certainly the lack of knowledge of facts on which his cause of action rests does not, in the ordinary case, excuse the plaintiff from pleading them, and if without knowledge of certain facts he has adopted a theory on which alone his pleading has been based, he cannot recover under such complaint on another

---

Ind. 4, 66 N. E. 916 (in this case the complaint failed to state a cause of action unless the facts showing the estoppel were alleged); Tonkawa Milling Co. v. Town of Tonkawa (1905), 15 Okl. 672, 83 Pac. 914; Rieschick v. Klingelhoefer (1902), 91 Mo. App. 430; Union State Bank v. Hutton (1901), 61 Neb. 571, 95 N. W. 1061.

[27] (1905), 33 Mont. 94, 81 Pac. 994.

[28] See note 14, page ——, of this magazine.

[29] Vellum v. Demerle (1892), 65 Hun. 543, 20 N. Y. Supp. 516; Hubbard v. Lee (1907), 6 Cal. App. 602, 92 Pac. 744.

theory, which has first been brought to his attention by evidence produced at the trial. The plaintiff's remedy, if newly discovered evidence changes his case, is to amend the pleadings so that they will embody the theory on which he finally seeks to recover. There is no reason why the rule should be any different where estoppel constitutes a part of the plaintiff's case. If the complaint is drawn on the theory of agency and at the trial the evidence fails to establish agency, but some of that offered shows estoppel, there is no reason why such evidence should be allowed to be introduced unless the complaint is amended to cover the evidence offered. When the courts have spoken of the necessity of pleading estoppel unless the party seeking to introduce it has had no opportunity to do so, they have used the word "opportunity" as applying and referring to the order of pleading, not to the information of the party pleading. The usual case where failure to plead estoppel does not bar evidence of it because of lack of opportunity to plead it arises where the code does not allow a reply and an answer by way of new matter sets up a defense, which, according to plaintiff's theory, the defendant is estopped to allege. In no instance where estoppel is a part of the plaintiff's affirmative case would the rule as to opportunity apply. Still other cases are to be found, which state as a general rule that estoppel as a part of the plaintiff's case need not be pleaded.[30]

In order to determine what the rule should be it is necessary first to consider what facts must be pleaded in setting up a cause of action in the ordinary code state. As hereinabove stated, the complaint, according to the codes, should contain "a plain and concise statement of the facts, constituting" the cause of action. The rule as to what facts are necessary to be pleaded under this code provision has been stated in various ways, but, in general, the cases seem to sanction the doctrine that only legal issuable facts can be pleaded.[31] This, then, is the test in any case, and if the legal issuable facts constituting a cause of action are pleaded, all facts, tending to prove the allegations and not barred by the rules of evidence, may be introduced. So if one determines in any case that the legal issuable facts are the facts constituting the estoppel, they should be pleaded; and, on the other hand, if the allegation, which, though not true, the defendant is by his acts and statements estopped to deny, is taken to be a legal issuable fact, then the necessity for setting up

[30] Plumb v. Curtis (1895), 66 Conn. 154, 173; Bernhard v. Rochester German Ins. Co. (1906), 79 Conn. 388, 65 Atl. 134; Larremore v. Squires (1898), 62 N. Y. Supp. 885.

[31] People v. Ryder (1885), 12 N. Y. 433; Sheridan v. Jackson (1878), 72 N. Y. 170; Boone, Code Pleading, § 10.

the estoppel as a part of the plaintiff's case disappears. These considerations lead us naturally to the inquiry, what is a legal issuable fact? So far as the writer can learn, neither courts nor text-writers have ever attempted a definition of this phrase, and any attempt to do so must take one into the domain of philosophy. Any definition reached by means of philosophical speculation would undoubtedly be unsatisfactory, if an attempt were made to apply it in an actual case. For practical purposes it seems enough to determine whether the phrase used includes as "a legal issuable fact" any allegation which, though untrue, cannot be disputed by the opposing party, or whether the popular meaning is to be given to the word, "fact," i. e., an event or reality. The writer chooses the latter meaning because he believes that is the one the makers of the code had in mind, if they considered the question at all. Adopting this interpretation, it is necessary in every instance where the plaintiff's case rests in estoppel to plead the facts constituting it. However, if the other interpretation, i. e., an allegation which may not be disputed, is placed on the phrase, it will not, generally, be necessary for the plaintiff to set up in his complaint the facts constituting the estoppel. This seems to be the nearest approach to a solution that the problem is capable of, as any attempt at a philosophical definition will introduce more difficulties and more disputes. The starting point in the determination of whether or not to plead estoppel as a part of the plaintiff's case should be at a certain definition, or conception of the meaning of the phrase, "legal issuable fact." If one meaning is adopted, it will be logically necessary to conclude that the facts constituting an estoppel are not the legal issuable facts, and hence need not be pleaded; and if the other definition of the phrase is accepted, a contrary result will be reached. If, however, two courts enter upon the solution of such a problem with the same conception of the meaning of the phrase, the ultimate results should be identical.

In conclusion, it is the writer's belief that the careful code pleader will prefer the rule that the facts constituting an estoppel, whether it constitutes a part of his cause of action or a defense, must be pleaded unless there is no opportunity to do so—understanding "opportunity" to refer to the order of pleading rather than to the knowledge or information of the party seeking to avail himself of the benefit of the estoppel. Though, as above suggested, there are varying decisions on the subject, and some of them holding flatly that in the case of estoppel by matter in pais the facts constituting the estoppel need not be pleaded, still these cases are in the minority and are opposed to the great weight of authority. Even in Con-

necticut and New York, in which states the doctrine that estoppel may be shown in evidence though not pleaded is strongest, some of the expressions of the courts lead one to believe that they themselves are not too well satisfied with the doctrine or the reasons given to uphold it.

GORDON STONER.

UNIVERSITY OF MICHIGAN.